Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. ~~75-9281~~

W. J. ESTELLE, JR., Director, Texas Department of Corrections, et al.
Petitioners

V.

The Hon. WILLIAM WAYNE JUSTICE, U.S. District Judge for the Eastern District of Texas,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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V.

THE HONORABLE WILLIAM WAYNE JUSTICE, U. S. District Judge for the Eastern District of Texas,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner,[1] W. J. Estelle, Jr., Director, Texas Department of Corrections, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 24, 1975.

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[1]Though the members of the Texas Board of Corrections are parties herein as well as in the proceeding below, this Petition, in consonance with the opinion of the court below, will make reference only to Petitioner W. J. Estelle, Jr.

OPINION BELOW

The opinion-order of the Court of Appeals, issued as and for the mandate, *In re Estelle*, 516 F.2d 480 (5th Cir. 1975), appears in the Appendix at 31(a)-39. The orders entered by the District Court for the Eastern District of Texas, Tyler Division, allowing the United States to intervene pursuant to Fed.R.Civ.P. 24(b) and to participate as amicus curiae with "full rights of a party," appear in the Appendix at 25, 1-2, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 24, 1975. A timely petition for rehearing and suggested rehearing *en banc* was denied on October 6, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district court usurps judicial and legislative power by permitting the intervention (or participation as amicus curiae *with full rights of a party)* of the United States, through the Attorney General, in a civil rights suit based on 42 U.S.C. § 1983, which does not allege a deprivation of constitutional rights on account of race, color, religion, sex or national origin.

2. Whether a federal district court usurps power by permitting the intervention (or participation as amicus curiae *with full rights of a party*) of a litigant without standing.

3. Whether a federal district court has jurisdiction to permit the intervention of the United States in a civil rights suit not involving allegations of discrimination.

4. Whether Federal Rule of Civil Procedure 24(b) cloaks the federal district court with power it does not have.

5. Whether a writ of mandamus can and should issue to check the usurpation of judicial and legislative power by the federal district court.

STATUTORY PROVISIONS PRIMARILY INVOLVED

Federal Rule of Civil Procedure 24(b):

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal . . . governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

United States Code, Title 42

> § 2000h-2. Intervention by Attorney General; denial of equal protection on account

of race, color, religion, sex or national origin.

Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution *on account of race, color, religion, sex or national origin, the Attorney General for or in the name of the United States may intervene* in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.
(Emphasis supplied).

STATEMENT OF THE CASE

The original action in the district court was commenced on November 24, 1972, by the named-plaintiff, David R. Ruiz, an inmate incarcerated at the Eastham Unit of the Texas Department of Corrections, against the Petitioner, as Director of the Texas Department of Corrections, (hereinafter referred to as TDC), alleging deprivation of certain constitutional rights. *Ruiz, et al. v. Estelle, et al.*, Cause No. 5523, docketed in the Eastern District of Texas, Tyler Division. By 1974, this cause had developed into a consolidated civil rights class action, brought pursuant to 42 U.S.C. §1983, alleging deprivation of constitutional rights of TDC inmates on Eighth Amendment cruel and unusual punishment grounds, which is to say, on grounds *other than* denial of equal protection due to race, color, religion, sex or national origin.

The pertinent developments which lead to the intervention of the United States began on April 12, 1974. By an order entered *sua sponte* on that day, the district court consolidated seven individual *pro se* prisoner civil rights actions against a number of

different defendants and ordered the United States to appear in the consolidated action "as *amicus curiae*, in order to investigate fully the facts alleged in the prisoners' complaints, to participate in such civil action *with the full rights of a party thereto*, and to advise this court at all stages of the proceedings as to any action deemed appropriate by it." See Appendix at 1-2. (Emphasis added).

By orders entered *sua sponte* on May 20 and 21, 1974, the district court consolidated an eighth similar *pro se* civil rights action and appointed Stanley Bass, Esquire, an attorney with the NAACP Legal Defense Fund, Inc. in New York City, to represent the plaintiffs in the consolidated action. This attorney subsequently moved for leave to file an amended complaint. The motion was granted by the Court on October 16, 1974. The amended complaint was filed as a class action naming W. J. Estelle, Jr., as the sole defendant and alleging that (1) medical care provided by the TDC was constitutionally inadequate, (2) prison security was inadequate to insure the physical well being of the inmates, (3) living conditions and working conditions at the TDC were constitutionally deficient, and (4) prison officials had unreasonably interfered with the access of prisoners to the courts and to their attorneys. None of the allegations in the amended complaint was grounded on racial or any other form of discrimination. See Appendix at 3-10. This is the present pleading of the Plaintiffs.

By order of November 18, 1974, William Bennett Turner, Esquire, of San Francisco, California, also an attorney associated with the NAACP Legal Defense Fund, Inc., was substituted for Mr. Bass as attorney for the plaintiffs. By a further order of December 12, 1974, the district court designated the action as a class action pursuant to FED. R. CIV. P. 23(b)(2) but deferred definition of the class and notice to the class.

On December 6, 1974, and after the present pleading of the Plaintiff was filed, the United States filed a motion to intervene as plaintiff in the action together with a complaint in intervention. Appendix at 11-24. The motion was granted by the district court the same day it was filed. Appendix at 25. The United States relied for its intervention on FED. R. CIV. P. 24(b)(2), on the "inherent authority of the United States, through its Attorney General, to sue to remedy severe and widespread deprivations of constitutional rights," and on its status as an amicus curiae with full rights of a party. See Appendix at 26-30.

On February 6, 1975, the United States filed a motion to add defendants and to file an amended complaint in intervention, which motion was granted. The amended complaint for the first time named, as defendants, the petitioners who are members of the Texas Board of Corrections.

On January 30, 1975, Petitioner moved that the United States be dismissed on the ground that it had no standing to intervene as a plaintiff or to proceed as *amicus curiae* with full rights of a party. On February 15, 1975, the district court denied Petitioner's motion to dismiss and refused to certify the question to the United States Court of Appeals for the Fifth Circuit for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

With all avenues for relief at the district court level foreclosed, Petitioner filed an application for writ of mandamus or other extraordinary relief in the United States Court of Appeals for the Fifth Circuit. That application was filed pursuant to 28 U.S.C. §1651, otherwise known as the All Writs Act. An order staying all proceedings by the United States was issued by that court on February 28, 1975. Oral arguments in said court were heard in April, 1975, and in a written opinion issued July 24, 1975, the court denied Petitioner's application and vacated its stay. *In re Estelle*, 516 F. 2d 480 (5th Cir. 1975); see Appendix at 31-39.

A motion for rehearing and suggestion for rehearing *en banc* was timely filed by Petitioner on August 6, 1975 and denied by the Fifth Circuit on October 6, 1975. See Appendix at 40. Subsequently, Petitioner's motion for recall and stay of judgment issued as mandate was denied by the Fifth Circuit on October 31, 1975. See Appendix at 41.

Thereafter, Petitioner filed an application for recall and stay of mandate with the Honorable Louis F. Powell, Jr., Associate Justice of this Court, requesting a stay pending the filing of this petition for writ of certiorari and a final determination of the matter by this Court. That application was denied by Mr. Justice Powell on November 25, 1975. See Appendix at 42.

REASON FOR GRANTING THE WRIT

Certiorari should be granted to determine a paramount nation-wide issue of first impression: whether a federal district court can be permitted to usurp powers it clearly does not have by permitting the United States to intervene (or participate as an amicus

curiae *with full rights of a party*)[2] in a civil rights suit, based on 42 U.S.C. §1983, wherein the United States has neither standing nor authority to participate.

ARGUMENT AND AUTHORITIES

I. A Federal District Court Usurps Judicial And Legislative Power By Permitting The Intervention (Or Participation As Amicus Curiae *With Full Rights Of A Party)* Of The United States, Through The Attorney General, In A Civil Rights Suit, Based On 42 U.S.C. § 1983, Which Does Not Allege A Deprivation Of Constitutional Rights On Account Of Race, Color, Religion, Sex or National Origin.

The Congress of the United States, pursuant to Section 5 of the Fourteenth Amendment [3] and Section 2

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[2]Petitioner does not argue that the United States cannot participate as amicus curiae, if by "amicus curiae" is meant a neutral friend of the court. Petitioner does contend, however, that an amicus curiae *with full rights of a party* is a misnomer, a mere subterfuge by the distict court to allow the intervention of the United States without calling it intervention.

[3]"The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §5.

of the Fifteenth Amendment, [4] has enacted numerous statutes which permit the United States or its Attorney General to institute or intervene in a civil rights suit in a number of specific instances--all involving allegations of discrimination on the basis of race, color, religion, sex or national origin. Thus, Title 42 U.S.C. §§1971(c), 1971(d), 1973h(b) and (c), 1973j(d) and (e), 1973aa-2 and 1973bb-2, all relate to discrimination in voting rights and provide authority for the United States or the Attorney General to sue. To the same effect are Title 42 U.S.C. §§ 2000a-3 and 2000a-5 (discrimination in use of specified public accomodations, the former providing for intervention by the Attorney General); § 2000b (discrimination in public facilities); § 2000c-6 (discrimination in public education); § 2000d-1 (action by particular federal departments or agencies to eliminate discrimination in federally assisted programs administered by each department or agency); §§2000e-5 and 2000e-6 (discrimination by employment); 2000h-2 (intervention in civil rights actions based on denial of equal protection on account of race, color, religion, sex or national origin); and §§3611 and 3613 (discrimination in housing). In sum, statutory authorization for participation by the United States as a party in civil rights litigation is limited to actions based on allegations of discrimination.

Not only is there no express authorization for active participation by the United States in a case such as the present one, but the Congress of the United States has considered and expressly rejected such a result. Drafts of the proposed Civil Rights Act of 1964 (42 U.S.C. §2000a *et seq.*) indeed vested broad intervention power in

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[4]"The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, §2.

the Attorney General in cases involving issues of constitutional violations; however, these were soundly criticized for their broad scope and were subsequently discarded in favor of statutes expressly limiting the authority of the Attorney General to those instances involving discrimination. *See* 1964 U.S. Code Congressional and Administrative News, 2355-2519, particularly at 2409, 2411, 2414, 2450, 2469 and 2502 for criticism of proposals *not* enacted; *see* New York Times, October 17, 1963, at 27, col 4 (Late City Ed.)

Notwithstanding the foregoing, the United States has persistently argued in this case that it has "inherent standing to sue to enjoin widespread and severe deprivations of constitutional rights."[5] See, *e.g.*, Appendix at 27. However, it is now settled that when Congress has considered two alternative methods by which the Federal Government may proceed in a given situation, and it rejects one of the proposed alternatives, the Executive is not vested with the power to proceed by way of the rejected alternative, notwithstanding the gravity of the emergency or allegations of "inherent authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); *see New York Times Co. v. United States*, 402 U.S. 713 (1971), particularly at 723 (Douglas & Black, JJ., concurring) and 741-47 (Marshall, J., concurring). In *Youngstown*, President Truman attempted to seize the nation's steel mills during war time to assure their continued operation in the face of a pending nationwide strike, even though Congress had

[5]The logical extension of this theory to each of the constitutional safeguards leads to a tremendous concentration of power in the hands of the federal government by means of provisions whose very purpose was to limit rather than extend its power. *See* 1964 U.S. Code Congressional and Administrative News 2450.

previously considered and rejected empowering the President to so act. In ruling against the President, the Court concluded that the executive branch possesses only those powers delegated to it by Congress and that the Constitution vests it with no inherent power or authority, thereby emphatically rejecting and tacitly overruling the notions of inherent executive authority previously suggested by *In re Debs*, 158 U.S. 564, 586 (1895).

Of the three judges who heard this case below, only one found a legal basis upon which the United States allegedly has authority to participate. He reasoned that Congress, by giving the United States criminal jurisdiction in civil rights cases, intended to give to the United States the power to redress a deprivation of constitutional rights in a civil action. *See In re Estelle*, 516 F.2d 480, 486-87 (5th Cir. 1975). However, such a conclusion is clearly erroneous in view of the fact that Congress has specifically considered granting such authority but refused to do so. See pages 9-10, *supra*. Moreover, the "principle of permitting civil relief where criminal sanctions are inadequate or ineffective," *Id.* at 487, was discredited in *New York Times Co. v. United States*, *supra*, particularly at 733-40 (White & Stewart, JJ., concurring) and 745-47 (Marshall, J. concurring), insofar as it pertains to the inherent authority of the United States to be an active participant in the present cause.

In sum, a federal district court usurps judicial

power and legislative power[6] by permitting the intervention (or participation as amicus curiae with full rights of a party) of the United States in a civil rights suit not involving allegations of discrimination.

II. A Federal District Court Usurps Power By Permitting The Intervention (Or Participation As Amicus Curiae *With Full Rights Of A Party)* Of A Litigant Without Standing.

Petitioner submits that the United States does not have standing to be an active litigant in this cause.

As stated recently by this Court in *Warth v. Seldin*,——— U.S. ———, 95 S.Ct. 2197 (1975):

> "[Standing] involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. (Citation omitted). In both dimensions it is founded in concern about the proper--and properly limited--role of the courts in a democratic society."
> *Id.* at 2205.

The United States clearly fails to meet the established

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[6]This court should note that this case presents other disturbing problems of judicial usurpation. For example, at least one member of the Fifth Circuit panel indicated intervention proper "to insure that indigent plaintiffs receive the quality of legal representation commensurate with the rights of which they claim they have been deprived." *In re Estelle, supra* at 487 n.5. Irrespective of the appointment of other nationally eminent counsel herein, Petitioner questions such a judicial balancing of equities, when the Congress itself has considered it but refused to do so. *See, e.g.*, 42 U.S.C. § 2000b and § 2000c-6(b) where Congress did balance the equities in other contexts.

requisites of either category of standing.

In order to supersede the constitutional limitation on federal court jurisdiction, a litigant must show that the challenged action has caused him injury in fact. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152 (1970). As delineated by this Court in *United States v. Richardson*, 418 U.S. 166, 179-80 (1974):

> "The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' *Baker v. Carr* . . . or a 'particular concrete injury,' *Sierra Club v. Morton* . . ., 'that he has sustained . . . a direct injury . . . .' *Ex parte Levitt* . . . ."

and reiterated in *Warth v. Seldin, supra* at 2205:

> "[T]he standing question is whether the (litigant) has 'alleged such a personal stake in the outcome of the controversy' to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers in his behalf."
> (Emphasis in original).

The United States clearly fails to satisfy these requisites, and the district court has no judicial power to permit its participation as a litigant, even though it could and should proceed to resolve the issues as framed by the parties having standing to sue. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

Other limitations on "the class of persons who may invoke the courts' decisional and remedial powers" include the requirement that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, supra* at 2205. The United States falls

squarely within this prohibition, its claim being based on the constitutional rights of others. Though Congress may remove this disability "either expressly or by *clear* implication," and pursuant thereto, the United States "indeed, may invoke the general public interest in support of (its) claim," *Id.* at 2206 (emphasis supplied), the Congress has expressly considered and refused to so act. See pages 9-10, *supra.*

In sum, the federal district court below usurped power by inviting and subsequently permitting the participation of the United States when it clearly lacked the foregoing requisites for standing.

III. A Federal District Court Does Not Have Jurisdiction To Permit The Intervention Of The United States In A Civil Rights Suit Not Involving Allegations Of Discrimination.

The federal courts have jurisdiction only as granted by Congress. 13 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE, §3522 (1975); *Victoria Carriers, Inc. v. Law*, 404 U.S. 202 (1971). Therefore, each authorization contained in the Civil Rights Acts of 1964 for the institution of suits by the Attorney General also granted jurisdiction to the federal courts over the relevant causes. *E.g.*, 42 U.S.C. §§2000a-6(a), 2000b(a), 2000c-6(a). Moreover, Congress has authorized the United States to intervene in any action containing allegations of discrimination on account of race, color, religion, sex or national origin, (42 U.S.C. §2000h-2), thereby giving the federal courts

jurisdiction to permit intervention under Rule 24 of the Federal Rules of Civil Procedure in cases alleging discrimination.[7] However, Congress has not authorized the United States to intervene in an action not containing allegations of discrimination, and a federal court is without jurisdiction to permit intervention in such cases.

IV. Federal Rule Of Civil Procedure 24(b) Does Not Cloak The Federal District Court With Power It Does Not Have.

The opinion below of the United States Court of Appeals for the Fifth Circuit is erroneously based upon Rule 24(b) of the Federal Rules of Civil Procedure.

It is fundamental that the Federal Rules of Civil Procedure do not create or enlarge either the substantive rights of a litigant, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 7-8 (1941), or the jurisdiction of the district courts, FED. R. CIV. P. 82; *Braddy v. Southwestern Bell Telephone and Telegraph Co.*, 458 F.2d 666, 669 (5th Cir. 1972). Thus, Rule 24(b) neither confers standing upon the United States nor jurisdiction upon the district court. Additionally, Rule 24(b) does not empower the district court to grant authority to the United States which it does not have and which Congress has expressly refused to convey.

V. A Writ Of Mandamus Can And Should Issue To Check The Usurpation Of Judicial And Legislative Power By The Federal District Court.

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[7]Also note 42 U.S.C. § 2000a-3(a), wherein a district court is granted the authority to permit the intervention of the Attorney General in yet another context.

In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), the Supreme Court reviewed a determination by a court of appeals not to issue its writ of mandamus to compel a district court to set aside an order under Rule 35 of the Federal Rules of Civil Procedure requiring the mental and physical examination of a defendant in a civil action. The court of appeals had recognized its jurisdiction to issue the writ but had declined to do so on the merits. Agreeing with the decision that the court had that power and reversing the court on the merits, the Supreme Court said:

> " 'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been *to confine an inferior court to a lawful exercise of its prescribed jurisdiction* * * * ,' Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26.
>
> "It is, of course, well settled, that the writ is not to be used as a substitute for appeal, Ex parte Fahey, 332 U.S. 258, 259-260, even though hardship may result from delay and perhaps unnecessary trial, Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-383; United States Alkali Export Assn. v. United States, 325 U.S. 196, 202-203; Roche v. Evaporated Milk Assn., supra, at 31. *The writ is appropriately issued, however, when there is 'usurpation of judicial power'* or a clear abuse of discretion, Bankers Life & Casualty Co. v. Holland, supra, at 383.
>
> "Here *petitioner's basic allegation was lack of power* in a district court to order a mental and physical examination of a defendant."
> *Id.* at 109-110. (Emphasis supplied.)

The present case falls squarely within the holding of *Schlagenhauf v. Holder* and the principles delineated by the authorities cited therein. In both *Schlagenhauf* and the instant case, the petition alleged a substantial question of usurpation of power. In both instances, the usurpation was accomplished by an unwarranted reliance upon a federal rule of civil procedure. In both, the issue presented was an important one of first impression. *Id.* at 110; *In re Estelle, supra* at 485.

Finally, Petitioner would direct the Court's attention to the numerous pending cases involving the intervention of the United States in circumstances such as presented here to substantiate the urgency and importance of the instant request. See Addendum to Brief for the United States, a part of which is reproduced in the Appendix hereto at 43-45. Moreover, an appeal after judgment by Petitioner (or similarly situated litigants) would necessarily be an ineffective remedy to correct the usurpation of power by the district court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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PETITIONER

CERTIFICATE OF SERVICE

I, Joe B. Dibrell, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioner. I do therefore certify that three copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the _____ day of December, 1975, addressed to:

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The Hon. WILLIAM WAYNE JUSTICE, U.S. District Judge for the Eastern District of Texas,
Respondent

* * *

APPENDIX

To Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

* * *

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BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

DAVID R. RUIZ	)	
	)	
V.	)	CIVIL ACTION NO. 5523
	)	
W. J. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	)	

A TRUE COPY I CERTIFY
ROSALIE M. TRAHAN, CLERK,
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BY
DEPUTY

ORDER

It appearing to the Court that this civil action and the following civil actions (all of which are pending in the Tyler Division of this Court), viz: Soto v. Estelle, No. 5594, Hilliard v. Estelle, No. TY-73-CA-20, Winchester v. v. Estelle, No. TY-73-CA-32, Randall v. Estelle, No. TY-73-CA-103, Pardo v. Estelle, No. TY-73-CA-207, and Johnson v. Estelle, No. TY-73-CA-260, involve common questions of law and fact, accordingly, pursuant to Rule 42(a), F.R.Civ.P., it is, sua sponte,

ORDERED that this civil action and the foregoing civil actions be, and they are hereby, consolidated.

This court having also determined that the public interest will be served by the participation of the United States of America in the consolidated civil action, it is

ORDERED that the United States of America make an appearance in the above-entitled and numbered consolidated civil action as amicus curiae, in order to investigate fully the facts alleged in the prisoners' complaints, to participate in such

civil action with the full rights of a party thereto, and to advise this court at all stages of the proceedings as to any action deemed appropriate by it. It is further

ORDERED that the Clerk of this Court deliver, forthwith, by mail or otherwise, copies of this order, as well as copies of all pleadings in the above-entitled and numbered consolidated civil action, to the Attorney General of the United States, to the United States Attorney for the Eastern District of Texas, and to the Attorney General of the State of Texas, and to the respective petitioners and their appointed counsel, if any.

SIGNED and ENTERED this 12th day of April, 1974.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

DAVID R. RUIZ, ERNESTO R. MONTANA, JR., L.D. HILLIARD, HERMAN RANDALL, AMADO PARDO, and O.D. JOHNSON, on behalf of themselves and all other persons similarly situated,	:	
Plaintiffs,	:	
- vs -	:	No. 5523
W.J. ESTELLE, Director, Texas Department of Corrections,	:	CLASS ACTION
Defendant.	:	

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, AND OTHER APPROPRIATE RELIEF.

Plaintiffs, by their counsel, complain against the defendant as follows:

I. JURISDICTION

1. This is a civil action seeking declaratory and equitable relief for the deprivation of plaintiffs' rights, secured and protected by the Constitution and laws of the United States, by defendant and his agents, acting under color of state law. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343(3) and §2201. The claims arise under 42 U.S.C. §1983, and the Fourteenth Amendment to the Constitution of the United States.

II. PARTIES

2. Plaintiffs are citizens of the United States and of the State of Texas. At the times relevant herein, they were, and still are, inmates of the Texas Department of Corrections. All were, and some still are, incarcerated at either the Coffield

Unit, at Tennessee Colony, Texas, or the Eastham Unit at Weldon, Texas, both located within the Eastern District of Texas.

3. Defendant is the Director of the Texas Department of Corrections, and as such, has general supervision of the Texas prisons. The acts complained of herein were done by his agents under his authority.

4. III. CLASS ACTION

A. Plaintiffs bring this action pursuant to Rule 23(a) and (b)(2) F.R.C.P., on behalf of themselves and all other persons similarly situated, which include the inmates at Coffield and Eastham Unit of T.D.C. and other Texas prisoners who are adversely affected by the policies, practices, and acts of the defendant and his agents complained of herein. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of plaintiffs are typical of the claims of the class; and plaintiffs will fairly and adequately protect the interests of the class. In addition, defendant and his agents have acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and equitable relief with respect to the class as a whole.

IV. CLAIMS

Defendants have deprived plaintiffs of their rights, privileges and immunities as follows:

5. Defendant has unduly restricted and interfered with plaintiffs' opportunity to conduct sealed or privileged correspondence with counsel, the courts and other governmental agencies.

(a) At least some letters to and from courts, attorneys and government agencies are delayed, opened, read, copied, recorded and/or rejected. In addition, after receipt of letters from the above sources, prison officials have seized, read, and confiscated such correspondence, thereby violating the confidentiality thereof. Other documents related to court proceedings have also been unlawfully confiscated.

(b) An additional barrier to the confidentiality of plaintiffs' correspondence with courts and attorneys is defendant's failure to provide notary services within secured areas. Accordingly, legal documents which require notarization cannot be sealed by inmates, inasmuch as inmates are required to turn these matters in for notarization which is effected outside the presence of the inmates or forego notarization of such documents.

(c) Furthermore, inmates who seek redress of grievances through means of the legal system or public officials are frequently reprimanded for doing so by selective enforcement of regulations, by receiving harsher disciplinary sentences and by harassment, verbal or otherwise.

6. Defendant has maintained and operated a medical care delivery system which was and is incapable of providing, has failed to provide and continues to fail to provide plaintiffs adequate medical care.

(a) The medical staff, facilities, equipment and procedures of defendants are insufficient to meet the routine health care needs of plaintiffs.

(b) The level of dental service maintained by defendant is unable to meet the routine dental care needs of plaintiffs.

(c) Defendant maintains no professional psychiatric staff capable of treatment of the inmate population on a regular basis.

(d) Defendant has failed and continues to fail to maintain sufficient professionally trained medical support personnel. Due to shortages of such personnel, defendant has continuously relied on unlicensed, untrained and unqualified correctional officers and other employees, as well as inmates personnel, to perform clinical and related medical services which should be performed solely by licensed qualified professionals.

(c) These systematic medical deficiencies have resulted in instances of actual impairment of inmate health and continue to pose an actual and potential threat to the physical health of well-being of plaintiffs.

7. Defendant has failed to provide plaintiffs the security safeguards minimally necessary to insure their well-being and safety.

(a) The security force is understaffed and inadequately trained and is unable to maintain proper order.

(b) As a consequence of the understaffing of the security force, more than necessary force is frequently used on inmates.

(c) Staff deficiencies have led to the practice of using inmates to supervise other inmates. These supervisory inmates are afforded special privileges by defendants and are punished for rules infractions less frequently than other inmates. This has resulted in the abuse of some inmates by "supervising" inmates.

(d) Inmates have been and are being subjected to assaults, rape and homosexual activities by other inmates. Defendant has failed to protect inmates from such abuses. Consequently,

inmates are in constant fear for their safety and lives as a result of defendant's disregard for their basic welfare and protection.

8. The living and working conditions of plaintiffs are inadequate and dangerous to the health and safety of plaintiffs.

(a) The physical facilities where plaintiffs are detained are overcrowded.

(b) Areas where food is prepared and where plaintiffs eat present a direct and potential health hazard to plaintiffs in that such facilities fail to meet applicable minimum standards.

(c) Plaintiffs' industries and work areas fail to meet applicable minimum health and safety standard.

9. The foregoing policies, practices, and acts of the defendant and his agents violate the following Fourteenth Amendment rights of plaintiffs and the members of their class:

(a) the right to be protected from bodily harm;

(b) the right not to be subjected to cruel and unusual punishments.

(c) the right to equal protection of the laws;

(d) the right to have reasonable access to the courts.

10. Plaintiffs and the members of their class have been and continue to be adversely affected and irreparably injured by the foregoing actions of defendant and his agents. They have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court:

(a) take jurisdiction of this matter;

(b) issue an order that this action may properly be maintained as a class action pursuant to Rule 23, F.R.C.P.;

(c) issue a declaratory judgment that defendant and his agents are violating the rights of plaintiffs and other members of their class, secured and protected by the Constitution and Laws of the United States;

(d) preliminarily and permanently enjoin defendant and his agents from continuing to violate the aforesaid rights of the plaintiffs and other persons similarly situated;

(e) order defendant to submit for the approval of this Court a comprehensive plan for the operation of Texas prisons, which will protect the aforesaid rights of the plaintiffs and members of their class;

(f) retain jurisdiction of this cause until the aforesaid approved plan is technically carried out and completed;

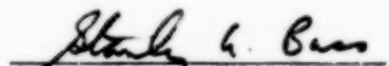
(g) restrain defendant and his agents from bringing any reprisals against plaintiffs or any prospective witnesses who may testify on their behalf, for bringing this lawsuit or for giving evidence in support thereof;

(h) order that plaintiffs recover from defendants all costs of this action, including reasonable attorneys' fees;

(i) grant plaintiffs and the class they represent all

other just and equitable relief.

Respectfully submitted,



STANLEY A. BASS
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10 Columbus Circle
Room 2030
New York, N.Y. 10019
(212) 586-8397

Attorneys for Plaintiff

October 8, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

- - - - - - - - - - - - - - - - - x

DAVID R. RUIZ, et al., :

Plaintiffs, :

v. :

W. J. ESTELLE, Director, :

Defendant. :

- - - - - - - - - - - - - - - - - x

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs, by their counsel, move pursuant to Rule 15(a) Fed. R. Civ. Proc., for leave to file an Amended Complaint herein. In support of this motion counsel states:

1. This proceeding is a consolidation of several pro se complaints filed by Texas prisoners against officials of the Texas Department of Corrections, alleging violations of their federal constitutional rights.

2. The Court has appointed counsel Stanley A. Bass, to represent the indigent prisoners.

3. After some preliminary investigation and research, plaintiffs' attorney has prepared an Amended Complaint, brought as a class action on behalf of all similarly situated Texas prisoners, seeking appropriate declaratory and injunctive relief, against the Director of the Texas Department of Corrections, for the alleged constitutional deprivations.

Respectfully submitted,

Stanley A. Bass

STANLEY A. BASS
WALLACE GOSSETT
10 Columbus Circle. Room 2030
New York, N.Y. 10019

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 1 1974
MURRAY L. HARRIS, CLERK
BY DEPUTY MYRA BARTON

DAVID R. RUIZ, et al.
Plaintiffs

v.

W. J. ESTELLE, Director, Texas Department of Corrections
Defendant

UNITED STATES OF AMERICA,
Applicant for Intervention.

CIVIL ACTION NO. 5523

MOTION TO INTERVENE AND TO ADD PARTIES DEFENDANT

The United States hereby moves the Court for leave to intervene as a party plaintiff pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure and to add as parties defendant the Texas Board of Corrections, H. H. Coffield, Chairman, James Marvin Windham, T. Louis Austin, Jr., Robert J. Bacon, M. D., Lester Boyd, Joe V. LaMantia, Jr., Mack McLaughlin, Fred Shield and L. H. True, Members of the Texas Board of Corrections.

This motion is based on the attached complaint

in Intervention, the pleadings and other documents on file in this action, and the attached memorandum.

Respectfully submitted,

ROBY HADDEN
United States Attorney

J. STANLEY POTTINGER
Assistant Attorney General

JESSE H. QUEEN
Attorney
Department of Justice

PATRICIA GAIL LITTLEFIELD
Attorney
Department of Justice

CHARLES ORY
Attorney
Department of Justice

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 1 1975
MURRAY E. HARRIS, CLERK
BY MYRA BARTON
DEPUTY

DAVID R. RUIZ, et al.,

Plaintiffs

UNITED STATES OF AMERICA,

Plaintiff-Intervenor

v.

W. J. ESTELLE, Director, Texas Department of Corrections; TEXAS DEPARTMENT OF CORRECTIONS, H. H. COFFIELD, Chairman, JAMES MARVIN WINDHAM, T. LOUIS AUSTIN, JR., ROBERT J. BACON, M. D., LESTER BOYD, JOE V. LaMANITA, JR., MARK McLAUGHLIN, FRED SHIELD, and L. H. TRUE, Members of the Texas Board of Corrections,

Defendants

CIVIL ACTION NO. 5523

COMPLAINT IN INTERVENTION

The United States alleges as follows:

1. This is a consolidated civil action brought by eight individual inmates of the Texas Department of Corrections seeking redress of violations of their rights under the First, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This Court has jurisdiction over this matter under 28 U.S.C. §1343(3), §1345 and §2201.

3. Defendant W. James Estelle is Director of the Texas Department of Corrections, Huntsville, Texas, and under Texas Ann. Stat., Art. 6166j. (1970), he is required to carry out the policies of the Board of the Texas Department of Corrections and to manage the affairs of the Texas Department of Corrections and, with the consent of the Board of the Texas Department of Corrections, is empowered "to prescribe reasonable rules and regulations governing the humane treatment, training and discipline of prisoners" and to provide for their classification.

4. The defendant Texas Board of Corrections is composed of nine members and is vested by Texas law (Texas Ann. Stat., Art. 6166g) with the exclusive management and control of the Texas Department of Corrections, and is "responsible for the management of the affairs of the Department of Corrections and for the proper care, treatment, feeding, clothing and management of the prisoners confined therein." Under Texas law the Board "shall manage and control the prison system through the manager [Director] selected by it." The Board is required "to delegate to such manager authority to manage the affairs of the prison system, subject to its control and supervision."

5. Defendants James Marvin Windham, T. Louis Austin, Jr., Robert J. Bacon, M. D., Lester Boyd, Joe V. LaMantia, Jr., Mark McLaughlin, Fred Shield and L. H. True are duly appointed members of the Texas Board of Corrections and, as such, are state officers within the meaning of the Texas Constitution.

6. The Texas Department of Corrections(hereafter TDC) operates fourteen adult correctional facilities for the State of Texas, including two located within the Eastern District of Texas. Approximately 17,000 persons are inmates of the facilities operated by TDC. These facilities are operated and staffed by personnel employed and discharged by the defendant Director with the approval of the defendant Board. Such personnel, including the wardens, have no statutory authority and act only with authority delegated to them by the defendants.

7. Under the Fourteenth Amendment to the United States Constitution, the defendants owe a duty to each inmate incarcerated in the correctional facilities operated by TDC not to deprive such inmate of his life, liberty or property without due process of law. That constitutionally mandated duty includes, but is not limited to, the following:

In addition, the United States has standing to sue to protect its interests or to carry out its policies. Kern River Co. v. United States, 257 U.S. 147 (1921); United States v. Fitzerald, 201 F.2d 295 (C.A. 8, 1912); Cotton v. United States, 11 How. 229 (1851); United States v. San Jacinto Tin Company, 125 U.S. 273 (1888); Sanitary District v. United States, 266 U.S. 405 (1925); United States v. Bell Telephone Co., 128 U.S. 315 (1888); United States v. Rock Island Centennial Bridge Commission, 230 F. Supp. 654 (S.D. Ill. 1964).

The United States has a direct, substantial, and protectible interest in the subject action in the vindication of the constitutional rights of the inmates confined to the Texas Department of Corrections. The United States believes that the public interest, including uniformity in prison standards, will be served by including all prison units in this litigation: Any independent suit which might be brought by the United States against officials of the Texas Department of Corrections would present substantially the same claims as are in issue in the subject action. The interest of the United States in the subject action is sufficient to warrant intervention.

The United States believes that this case involves issues of wide and general public importance and that the public interest, and the interest of the United States should be represented.

Finally no party in this subject matter will be prejudiced by the United States' becoming a plaintiff-intervenor, since the order making the United States amicus curiae held:

> This Court having also determined that the public interest will be served by the participation of the United States of America in the consolidated action, it is
>
> ORDERED that the United States of America make an appearance in the above-entitled and numbered consolidated civil action as amicus curiae, in order to investigate fully the facts alleged in the prisoners' complaints, to participate in such civil action with the full rights of a party thereto, and to advise this Court at all stages of the proceedings as to any action deemed appropriate by it. [emphasis added]

Under Texas Ann. Stat., Art. 6166g. (1970), the Texas Board of Corrections is vested with exclusive management and control of T.D.C., which management is to be delegated to the Director, subject to the Board's control and supervision. The United States seeks to add the Texas Board of Corrections and its members as defendants because the Director and the Board share responsibilities under the statute and are proper parties to this action.

a. The duty to provide a medical care delivery system which is accessible and adequate to meet the medical needs of all inmates.

b. The duty to provide living and working conditions which do not jeopardize the health and safety of the inmates.

c. The duty to provide inmates with reasonable protection from physical assault.

d. The duty to permit inmates reasonable access to the courts and to public officials for redress of their grievances.

e. The duty to supervise and control prison officials and employees sufficiently to prevent the systematic imposition of summary and other cruel and unusual punishment on inmates and the systematic denial of due process to inmates.

8. The defendants have subjected inmates to cruel and unusual punishment by denying to them adequate medical care in the following ways, among others:

a. They have provided only one hospital, located at Huntsville, to serve all fourteen correctional facilities and that hospital has been found by the Texas Hospital Association to be inadequate to meet the association's standards in that the physical plant is outmoded, unsafe and insufficient, the equipment is insufficient and in disrepair, the staff is insufficient in numbers and training and the record keeping and medical procedures are unsound.

b. They have failed to provide any full-time medical doctors to any of the correctional facilities other than Huntsville and have failed to provide sufficient medical technicians to staff these institutions, even with paraprofessionals, on a 24 hour basis.

c. They have not required the adoption and implementation of procedures and standards for the delivery of medical care which provide for proper diagnosis of medical

complaints, referral of patients to appropriate treatment facilities, prescription of appropriate medical treatment and administration of prescribed treatment under medically sound circumstances.

d. They have permitted inmates and medical technicians to perform medical tasks which they are not qualified to perform.

e. They have permitted correctional officers to deny medical care to inmates needing such care.

9. The defendants have subjected inmates to cruel and unusual punishment by providing working and living conditions which jeopardize the health and safety of the inmates in the following ways, among others:

a. TDC operates an extensive agricultural, industrial and construction program which provides food, clothing, buildings and some equipment for the prison system. This program includes various types of farming, processing of farm products and manufacturing. Inmates are required to work in these farming operations and industries, but the defendants have not required that minimumly adequate health and safety standards be maintained. In

1969, the Texas Occupational Safety Board surveyed the prison industries at several TDC facilities and reported numerous violations of safety and health standards. Over all, conditions are substantially unimproved.

b. The defendants have housed inmates in overcrowded quarters, which are injurious to the physical and mental health of the inmates.

10. The defendants have subjected inmates to cruel and unusual punishment by failing to provide them reasonable protection from physical assault, in the following ways, among others:

a. They have not required that correctional personnel be adequately trained and supervised and have failed to provide sufficient correctional personnel to maintain reasonable security.

b. They have failed to implement an inmate classification system, based upon valid criteria, which would minimize the likelihood of physical assault by inmates on other inmates.

c. They have permitted the continued use of selected inmates, usually called "building tenders," to control other inmates, which practice frequently has and does result in physical assaults on inmates.

d. They have failed to enforce the requirement that TDC employees not use corporal punishment on inmates, such as spraying chemical agents on inmates locked in cells.

11. The defendants have allowed interference with inmates' attempts to redress their grievances through the courts and public officials in the following ways, among others:

a. They have failed to enforce their regulation that inmates' correspondence with courts and certain public officials "shall not be opened for inspection or impeded in its transmission."

b. They have failed to require that inmates be provided with a reasonable opportunity to prepare and submit court documents and petitions.

c. They have failed to prevent correctional officers from taking retaliatory action against inmates who write letters and petitions to public officials.

12. The defendants have not supervised and controlled prison officials and correctional officers sufficiently to prevent them from systematically imposing summary punishment on inmates. For example:

a. Prison officials and correctional officers have, on more than one occasion, sprayed a chemical agent on an inmate who was posing no threat to the security of the prison and who was securely locked in his cell. The defendants have not adopted any policy or promulgated any regulation concerning the use of chemical agents on inmates.

b. Prison officials and correctional officers routinely impose disciplinary sanctions involving serious deprivations of privileges, including solitary confinement and loss of good time, without providing the inmate with advance written notice of the charge or an opportunity to prepare a defense. The defendants have adopted a policy reflected in its regulations which expressly permits such disciplinary action to be taken against inmates, without prior or written notice of the charge.

c. Defendants have failed to inform inmates adequately of what conduct violates TDC's Rules and Regulations and what conduct violates the local units' rules and regulations.

13. The acts, practices and conditions described in paragraphs 7 through 12, supra, are in violation of, and have denied inmates of the Texas Department of Corrections, rights, privileges, and immunities secured to them by the Constitution of the United States.

14. Unless restrained by order of this Court, defendants will continue to commit such acts, engage in such practices and maintain such conditions to the immediate and irreparable injury of the plaintiff-intervenor. The plaintiff-intervenor has no adequate remedy at law.

WHEREFORE, the United States prays that the Court enter an order enjoining the defendants, their officers, employees, agents, and successors and all those acting in concert or participation with them from engaging in any of the acts or practices described in paragraph 7 through 12 above and more particularly; from:

1. Failing or refusing to provide inmates with a medical care delivery system which is accessible and adequate to meet their medical needs;

2. Failing or refusing to provide living and working conditions which do not jeopardize the health and safety of inmates;
3. Failing or refusing to provide inmates reasonable protection from physical assault;
4. Failing or refusing to permit inmates reasonable access to the Courts and to public officials for redress of grievances;
5. Failing or refusing to supervise and control prison officials and employees sufficiently to prevent the systematic imposition of summary and other cruel and unusual punishment on inmates and the systematic denial of due process to inmates.

The United States further prays that this Court grant such other injunctive relief as the needs of justice may require together with the cost and disbursements of this action.

J. STANLEY POTTINGER
Assistant Attorney General

ROBY HADDEN
United States Attorney

JESSE H. QUEEN
Attorney
Department of Justice

PATRICIA GAIL LITTLEFIELD
Attorney
Department of Justice

CHARLES ORY
Attorney
Department of Justice

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 6 1974
MURRAY L. HARRIS, CLERK
BY DEPUTY MYRA BARTON

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

DAVID R. RUIZ, ET AL.	)	
	)	
V.	)	
	)	CIVIL ACTION NO. 5523
W. J. ESTELLE, DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS	)	
	)	
UNITED STATES OF AMERICA	)	

O R D E R

Came on for consideration the motion of United States of America for leave to intervene as a party plaintiff pursuant to Rule 24(b)(2) of the Fedrral Rules of Civil Procedure, and to add as parties defendant the Texas Board of Corrections, H. H. Coffield, Chairman, James Marvin Windham, T. Louis Austin, Jr., Robert J. Bacon, M.D., Lester Boyd, Joe V. LaMantia, Jr., Mack McLaughlin, Fred Shield and L. H. True, Members of the Texas Board of Corrections, and after due consideration, the court is of the opinion that said motion should be granted. Accordingly, it is

ORDERED that said motion be, and it is hereby, GRANTED, and that the complaint in intervention be accepted by the Clerk of the U. S. District Court for filing.

SIGNED AND ENTERED this 6th day of December, 1974.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 6 1974
MURRAY L. HARRIS, CLERK
BY DEPUTY MYRA BARTON

DAVID R. RUIZ, et al.,

Plaintiffs

v.

W. J. ESTELLE, Director
Texas Department of
Corrections

Defendant

UNITED STATES OF AMERICA,

Applicant for
Intervention.

CIVIL ACTION NO. 5523

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO INTERVENE AND TO ADD PARTIES DEFENDANT

The United States, currently amicus curiae in this consolidated lawsuit, seeks to intervene as plaintiff-intervenor and to add parties defendants and hereby submits this Memorandum of Law in Support of our Motion to Intervene and To Add Parties Defendant.

Sufficient authority for permitting the United States to intervene in the subject action is found in Rule 24(b), Federal Rules of Civil Procedure, and in the inherent authority of the United States, through its Attorney General, to sue to remedy severe and widespread deprivations of constitutional rights. The requirements or Rule 24(b)(2) pertaining to permissive intervention are clear. The intervening party must (a) make a timely application; (b) show that his claim

or defense and the main action have a question of law or fact in common; and (c) show that the intervention will not unduly delay or prejudice the original parties. See, S.E.C. v. United States Realty and Improvement Company, 310 U. S. 434 (1940); Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970); Teischerd v. Leopold, 342 F. Supp. 299 (D. Vt. 1972); United States v. Fidelity and Deposit Co., 22 F.R.D. 248 (M.D. Pa. 1958) and Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481 (D. Conn. 1972).

The consolidated subject action has been pending for only a brief period of time; no trial date has been set by the Court. Application for intervention by the United States in this action is not untimely, especially since we are already in the suit as amicus curiae, with the full rights of a party.

The United States has inherent standing to sue to enjoin widespread and severe deprivations of constitutional rights. In re Debs, 158 U. S. 564 (1895); United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D. N.Y. 1970); United States v. City of Jackson, 318 F. 2nd 1 (C.A. 5, 1963; rehearing denied, 320 F.2d 870 (C.A. 5, 1963); United States v. United States Klans, 294 F. Supp. 897 (M.D. Ala. 1961); United States v. Lassiter, 203 F. Supp. 20 (W.D. La. 1962), aff'd, 371 U. S. 10 (1962), and Battle and United States v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974).

For the foregoing reasons, we respectfully request that this Court grant the motion of the United States for leave to intervene in this action and to add as defendants the Texas Board of Corrections.

Respectfully submitted,

ROBY HADDEN
United States Attorney

J. STANLEY POTTINGER
Assistant Attorney General

CHARLES ORY
PATRICIA GAIL LITTLEFIELD
Attorneys
Department of Justice
Washington, D. C. 20530

EXHIBIT D

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

July 24, 1975

Mr. Murray L. Harris, Clerk
U.S. District Court
P.O. Box 539
Tyler, Texas 75701

Re: 75-1464 IN RE: W. J. ESTELLE, JR.
(D.C. No. CA 5523)

Dear Mr. Harris:

Enclosed is a certified copy of an opinion-order this day issued by the court in the referenced cause which is issued as and for the mandate.

Very truly yours,

EDWARD W. WADSWORTH, CLERK

By June H. Parent
Deputy Clerk

/ap
enc.

cc: Messrs. George R. Bedell
Daniel O. Goforth
Messrs. Jack W. Flock
Mike A. Hatchell
Mr. Roby Hadden
Mr. William Bennett Turner
Ms. Gail Littlefield
Mr. J. Stanley Pottinger

as well as the additional statements, 497 F.2d at 933:

> The question of the existence vel non of insurance was not submitted to the jury as an element of the offense charged, and appellant contends that consequently the jury failed to find a crucial and jurisdictional element of the alleged crimes. As to the accusation of having embezzled from a federally insured institution, appellant is entirely correct: it was neither proved nor found.

The argument advanced by the panel opinion that Mrs. Hand knew what she was charged with, "• • • embezzling funds from her named employer • • •"—and hence the "plain and concise statement" requirement of Rule 7(c), F.R.Crim.P. was satisfied—is wide of the mark.

Mrs. Hand was not on trial in a state court, where general allegations of embezzlement from a specified employer might suffice. Instead she was on trial in a court whose jurisdiction was limited to trying violations of federal laws, here specifically Title 18, U.S.C., Section 657. Jurisdiction, not affirmatively appearing from the face of the indictment, was simply never present.

As to the second proposition, that regardless of the shortcomings of the charge, as laid in the indictment, somehow a case was made out: in addition to the quotations, *supra*, from Part II of the panel opinion, I turn to an additional statement in that opinion, 497 F.2d at 933:

> It is undisputed that the United States offered no proof that the deposits of the Union were insured in the manner charged.

That was enough to end the matter.

As to the search point covered by Judge Dyer's dissent, the majority labors mightily to salvage a patently unconstitutional search and seizure. This *ad hoc* approach serves the purpose, in addition to preserving Mrs. Hand's conviction, of approving unbelievably sloppy police work.

As to Part II, to which this dissent is directed, incredibly inefficient and insufficient pleading and proof by a United States Attorney, or perhaps his assistant, while certainly not approved, is not condemned either. I do not perceive a valid reason for this court to rescue this gentleman.

That Mrs. Hand may escape from punishment is overshadowed here by more important considerations. Poor performance by investigators and prosecutors should not pass muster unscathed and uncensured on the basis of an *ad hominem* approach that guilt of some offense is clear from the record. This misconceives our prime function of reviewing errors of law. I suggest also that occasional merited criticism of police and prosecutors is beneficial to the advancement of good order and discipline.

Efficient crime detection and punishment is not advanced but is retarded when we place precedents such as today's in the books. It will return to vex us on another day.

With deference, I dissent from the majority opinion on the basis of these views as to Part II, as well as with respect to the unconstitutional search and seizure, so convincingly explicated by Judge Dyer.

In re W. J. ESTELLE, Jr., Director, Texas Department of Corrections, et al., Petitioners.

No. 75-1464.

United States Court of Appeals, Fifth Circuit.

July 24, 1975.

Director of the Texas Department of Corrections filed an original proceeding for a writ of mandamus or prohibi-

tion seeking to prevent further participation by the United States as amicus curiae or plaintiff-intervenor in a civil rights action brought against the Department by state prison inmates. The Court of Appeals, Tuttle, Circuit Judge, held that even if the United States lacked the requisite "interest" in the subject litigation as defined by federal intervention rules, and even if the trial court thus abused its discretion in allowing the United States to intervene, the Director of the Department was not entitled to an extraordinary writ, since he failed to demonstrate any hardship, let alone any irreparable harm, that had occurred or was likely to occur immediately, and since there was therefore no reason to ignore the rule of finality and the clearly established mode of review for interlocutory orders of the type in question.

Petition denied and stay vacated.

Godbold, Circuit Judge, filed an opinion concurring in part.

1. Courts ⇐404(1)

An extraordinary writ under the All Writs Act is a drastic remedy that must not be used to regulate the trial court's judgment in matters properly left to its sound discretion, but that may be available to confine the trial court to sphere of its discretionary power. 28 U.S.C.A. § 1651(a).

2. Courts ⇐404(1)

An extraordinary writ under the All Writs Act may be appropriate to prevent a trial court from making a discretionary decision where a statute effectively removes the decision from the realm of discretion. 28 U.S.C.A. § 1651(a).

3. Courts ⇐26

Certain discretionary acts lie within the inherent authority of trial court, despite the lack of specific authorization by statute or rule.

4. Prohibition ⇐3(1)

Even if the United States lacked the requisite "interest" in the subject litigation as defined by federal intervention rule, and even if the trial court thus abused its discretion in allowing the United States to intervene in civil rights action brought by inmates against the Texas Department of Corrections, the Director of the Department was not entitled to an extraordinary writ, since he failed to demonstrate any hardship, let alone any irreparable harm, that had occurred or was likely to occur immediately, and since there was therefore no reason to ignore the rule of finality and the clearly established mode of review for interlocutory orders of the type in question. 28 U.S.C.A. § 1651(a); Fed.Rules Civ.Proc. rule 24(b)(2), 28 U.S.C.A.

5. Mandamus ⇐4(1)

Mandamus does not run the gauntlet of reversible errors and may not be used to thwart the congressional policy against piecemeal appeals. 28 U.S.C.A. § 1651(a).

6. Courts ⇐405(12.7)

An order allowing intervention is interlocutory and may not be appealed immediately.

7. Courts ⇐406.1(12)

Proper remedy for review of an order allowing intervention is appeal from the final judgment.

8. Mandamus ⇐1

Even the expense and inconvenience of a trial as a prerequisite to review does not justify the issuance of mandamus without more. 28 U.S.C.A. § 1651(a).

9. Mandamus ⇐3(1)

Complaint made by the Director of the Texas Department of Corrections, who sought an extraordinary writ to prevent further participation by the United States as amicus curiae or plaintiff-intervenor in civil rights action brought by inmates against the Department, as to the scope and cost to him of the discovery sought by the United States in the litigation was premature, since the trial court had yet to rule on the Director's motions to limit and prevent certain aspects of the inquiries proposed by the United States and since the federal rules provide a number of grounds for limiting discovery and protecting parties from unreasonable investigations and inquiries. 28 U.S.C.A. § 1651(a); Fed.Rules Civ.Proc. rule 26(c), 28 U.S.C.A.

John L. Hill, Atty. Gen. of Tex., George R. Bedell, Daniel O. Goforth, Asst. Attys. Gen., Austin, Tex., for petitioner.

Jack W. Flock, Mike A. Hatchell, Tyler, Tex., William Bennett Turner, San Francisco, Cal., for David Ruiz and others.

Roby Hadden, U. S. Atty., Tyler, Tex., Gail Littlefield, Office of Public Accommodation & Facilities, J. Stanley Pottinger, Asst. Atty. Gen., Civil Rights Div., Dept. of Justice, Washington, D. C., for Public Accommodation & Facilities.

On Petition for Writ of Mandamus or Other Extraordinary Relief.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

TUTTLE, Circuit Judge: *

This is an original proceeding for a Writ of Mandamus or of Prohibition against the Hon. William Wayne Justice, United States District Judge for the Eastern District of Texas, Tyler Division. Petitioner W. J. Estelle, Director of the Texas Department of Corrections (TDC), seeks a Writ, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), to prevent the further participation by the United States as *amicus curiae* or plaintiff-intervenor in *Ruiz v. Estelle*, No. 5523 (W.D. Tex., Tyler Div.). The petitioner alleges that "the trial court abuse[d] its discretion when it permitted the United States to intervene in *Ruiz*" and prays for a Writ ordering the trial court to dismiss the United States from the case.

I.

Over three years ago, David Ruiz and seven other inmates of the Texas Department of Corrections filed suits under 42 U.S.C. § 1983 complaining that the TDC had violated their constitutional rights in several ways and asking for injunctive and declaratory relief. The trial court determined that the cases involved common questions of fact and law, and ordered that the cases be consolidated pursuant to Rule 42(a), F.R. Civ.P., into a single civil action under the style of *Ruiz v. Estelle*.

The trial court appointed counsel to represent the plaintiffs, and granted the plaintiffs' motion six months ago to file an amended complaint. The court further ordered the case to proceed as a class action, pursuant to Rule 23(b)(2), F.R.Civ.P., but deferred definition of the class.

Between the filing of the original complaints and the filing of the amended complaint, the court ordered the United States to appear in the case as *amicus curiae* "[i]n order to investigate fully the facts alleged in the prisoners' complaints, to participate in such civil action with the full rights of a party thereto, and to advise [the] court at all stages of the proceedings as to any action deemed appropriate by it."

On December 6, 1974, the trial court granted the motion of the United States to intervene and ordered its complaint in intervention filed.[1] In its capacity as plaintiff-intervenor, the United States has commenced substantial discovery. In addition to serving notice of depositions and to propounding interrogatories, the United States has a pending request

* This opinion through Part A of II *infra* is agreed to by Judge Morgan. The part of this opinion under heading B represents only the separate views of Judge Tuttle.

1. The gravamen of the amended complaint is two-fold: it alleges that the TDC subjects inmates to cruel and unusual punishment (by inadequately providing for their personal security and safety, by failing to provide minimally adequate medical care, and by forcing them to live and work under unsafe conditions), and that the TDC deprives its inmates of Due Process of Law by interfering with their access to lawyers and the courts (by impeding communications and punishing such communications).

pursuant to Rule 34, F.R.Civ.P., to inspect the TDC facilities in question and to interview inmates and employees.[2]

The petitioner moved to dismiss the United States as *amicus curiae* and as plaintiff-intervenor on January 30, and on February 5 to stay participation by the United States in the case pending a determination of its status. The trial court denied the petitioner's motions after a hearing and further denied a request to certify an interlocutory appeal of the ruling pursuant to 28 U.S.C. § 1292(b).

Thereafter on February 18, the petitioner filed a petition in this Court for a Writ of Mandamus and/or other extraordinary relief to prevent further participation by the United States in the case, and on February 28 this Court stayed "[a]ll proceedings involving or initiated by the United States" pending disposition of the petition. The case was set for argument at an expedited hearing. The petitioner claims that the trial court abused its discretion under Rule 24(b)(2), F.R.Civ.P., by permitting the United States to intervene in the case and that a Writ of Mandamus or Prohibition should be granted to bar further participation by the United States.

II.

A.

[1-3] The prerequisite standards for issuing an extraordinary Writ under the All Writs Act have been frequently rehearsed, although their meaning is sometimes conceptually elusive. *See* Bell, The Federal Appellate Courts and the All Writs Act, 23 Sw.L.J. 858, 862 67 (1969). However, the standard we set out ten years ago in *Miller v. Connally*, 354 F.2d 206, 208 (5th Cir. 1965), is still applicable as a general rule today:

> "The Writs of Mandamus and Prohibition are granted sparingly. Such writs are 'reserved for really extraordinary causes,' *Ex Parte Fahey*, 332 U.S. 258, 260, 67 S.Ct. 1558, 91 L.Ed. 2041, 2043 (1947), and should be issued only when the right to such relief is 'clear and indisputable.' *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582, 19 S.Ct. 286, 43 L.Ed. 559, 561 (1899). To some extent they are supervisory in nature and are used 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185, 1190 (1943). They are not to be used as a substitute for an appeal, or to 'control the decision of the trial court' in discretionary matters. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106, 111 (1953)."

The Writ is thus a "drastic remedy," *Will v. United States*, 389 U.S. 90, 104, 88 S.Ct. 269, 278, 19 L.Ed.2d 305 (1967), that must not be used to regulate the trial court's judgment in matters properly left to its sound discretion, but that may be available to "confine the lower court to the sphere of its discretionary power," *Id.* No court has ever precisely defined "sphere of discretionary power," but it is clear that an extraordinary Writ may be appropriate to prevent a trial court from making a discretionary decision where a statute effectively removes the decision from the realm of discretion. *Cf. S.E.C. v. Krentzman*, 397 F.2d 55 (5th Cir. 1968).[3]

2. The petitioner has vigorously opposed the pending inspection. On Jan. 17, 1975, he issued a directive to all wardens of the various TDC units prohibiting interviews of employees by any agent of the United States Department of Justice. He opposed interviews and inspections on the ground that they would jeopardize "the security of the inmates, personnel and prison facilities." (Now, in this proceeding, the director further complains that the interviews and inspections would be unreasonably burdensome and expensive to the TDC.) The trial court has not yet ruled on the matter.

3. This is not to say, of course, that the trial court may only exercise discretionary judgment where a rule or statute specifically authorizes it to do so. Certain discretionary acts lie within the inherent authority of the trial court, despite the lack of specific authorization by statute or rule. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281, *reh. denied*, 394 U.S. 1025, 89 S.Ct. 1623, 23 L.Ed.2d 50 (1969), where the Supreme Court held that the district court had inherent authority to compel answers to interrogatories in habeas corpus proceedings, and thus that mandamus would not lie to prevent the district court from so ordering.

The petitioner contends here that the trial court "abused its discretion" by allowing the United States to intervene permissively in *Ruiz* under Rule 24(b)(2), F.R.Civ.P. (quoted below). In essence, the petitioner's argument is that while Rule 24(b)(2) empowers the trial court to allow permissive intervention at its discretion, it does not allow the trial court to allow intervention by a litigant who does not manifest the requisite "interest" in the litigation as defined by the Rule.

[4-7] However, even were we to hold that the United States lacked a requisite interest within the meaning of Rule 24(b)(2) and therefore that the trial court had abused its discretion by allowing intervention, the petitioner would not automatically be entitled to the extgaordinary Writ he seeks. "Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382, 74 S.Ct. 145, 147, 98 L.Ed. 106 (1953)." *Will v. United States, supra*, 389 U.S. at 104, 88 S.Ct. at 278. The Writ "may not be used to thwart the congressional policy against piecemeal appeals," *Id.* An order allowing intervention is interlocutory and may not be appealed immediately. *See Van Hoomissen v. Xerox Corp.*, 497 F.2d 180 (9th Cir. 1974); *Wright & Miller*, Fed.Prac. and Procedure: Civil § 1923. The proper remedy for review of such an order is appeal from final judgment. *See, e.g., S.E.C. v. United States Realty & Improvement Co.*, 310 U.S. 434, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940); *Stell v. Savannah-Chathorn County Board of Education*, 333 F.2d 55 (5th Cir. 1964), *cert. denied sub nom. Roberts v. Stell*, 379 U.S. 933, 85 S.Ct. 332, 13 L.Ed.2d 344 (1964). Were we to grant the Writ sought in this proceeding, we would be circumventing the rule of finality and subverting well-established lines of appellate review in matters of this sort.

[8, 9] It is no answer for the petitioner to argue that participation by the United States in *Ruiz* will result in burdensome and expensive discovery. In the first place, even the expense and inconvenience of a trial as a prerequisite to review has been held not to justify the issuance of mandamus without more. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 30-31, 63 S.Ct. 938, 87 L.Ed. 1185 (1943); *United States Alkali Assn. v. United States*, 325 U.S. 196, 202 203, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945). In the second place, moreover, the claim of hardship of which the petitioner complains here is either unexceptionable or premature. It is unexceptionable because it is no more than the full and vigorous discovery that a large, system-wide class action anticipates. In any event, the petitioner's complaint as to the scope and cost to him of the discovery sought by the United States is premature, because the trial court has yet to rule on the petitioner's motions to limit and prevent certain aspects of the enquiries proposed by the United States. The Federal Rules of Civil Procedure, especially Rule 26(c), provide a number of grounds for limiting discovery and protecting parties from unreasonable and unduly burdensome investigations and enquiries. Yet the petitioner has declined to invoke the panoply of protection offered by Rule 26(c), and instead has sought interlocutory review through the All Writs Act. This failure to invoke protection available in the district court makes the alleged hardship speculative, if not ephemeral, and only serves to underscore the dangers of truncating litigation by resort to extraordinary interlocutory review. In short, the petitioner has failed to demonstrate any hardship, let alone any irreparable harm,

that has occurred or is likely to occur immediately. We see no reason to ignore the rule of finality and the clearly established modes of review for orders of the type in question.

B.

Judge Morgan concludes that the petition should be denied for the reasons outlined above. While I agree that the petition should be denied, I believe firmly—because the petition raises an important question of first impression, and a question of the scope of the trial court's power under the Federal Rules of Civil Procedure—that it is appropriate to reach the merits of the question rather than resting the decision only on the reasons discussed above. *Cf. Schlagenhauf v. Holder*, 379 U.S. 104, 111, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); and *see, generally*, Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv.L.Rev. 595 (1973).

Rule 24(b)(2), F.R.Civ.P., provides:

> "Upon timely application anyone may be permitted to intervene in an action: * * * (2) *when an applicant's claim or defense and the main action have a question of law or fact in common.* When a party to an action relies for [a] ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the trial court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." [Emphasis added.]

The "claim or defense" portion of the rule has been construed liberally, and indeed the Supreme Court has said that it "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. United States Realty & Improvement Co., supra*, 310 U.S. at 459, 60 S.Ct. at 1055, 84 L.Ed. at 1293. *See also Textile Workers Union of America, CIO v. Allendale Co.*, 96 U.S.App.D.C. 401, 226 F.2d 765 (D.C. Cir. 1955); *United States v. Local 638, Enterprise Assn., Etc.*, 347 F.Supp. 164 (S.D.N.Y.1972). Two distinguished commentators have observed that "it appears that the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit . . ." *Wright & Miller, supra*, § 1911. *See also* Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv.L.Rev. 721, 732-36 (1968).

The United States, acting as respondent in this proceeding pursuant to Fifth Circuit Local Rule 22, contends that it satisfies the requirements of Rule 24(b)(2), and thus that the trial court acted within the sphere of its discretionary power in permitting it to intervene, on three grounds: 1) that it falls within the express language of the Rule, 2) that it has inherent authority to participate in litigation involving its interests (*e. g., In Re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 [1895]), and 3) that 28 U.S.C. § 517[4] provides a general statutory authorization for such participation. Because I agree with the United States on the first ground, I would find it unnecessary to reach the other two grounds.

The original complaint in this case, as well as the amended complaint and the complaint of the United States in intervention, were all grounded on 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§ 1983 thus provides for private relief in civil actions from the deprivation of rights secured by the Constitution and its laws. The protection from deprivation of civil rights is not confined solely to civil redress, however; §§ 241 and 242 of Title 18 of U.S.C. provide for criminal penalties for the deprivation of such rights. The criminal statutes provide:

> § 241. *Conspiracy against rights of citizens.*
>
> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * * They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any terms of years or for life.
>
> § 242. *Deprivation of rights under color of law.*
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

The conceptual overlap of the civil and criminal statutes is obvious: they are both aimed, virtually by the same operative language, at redressing the deprivation of civil rights under the color of state law. Indeed, as we have said before, the criminal and civil statutes are *in pari materia*. *Baldwin v. Morgan*, 251 F.2d 780, 789 (5th Cir. 1958). *See also Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 248 48, *reh. denied*, 152 F.2d 753 (3rd Cir. 1945), *cert. denied*, 332 U.S. 776, 68 S.Ct. 38, 92 L.Ed. 361 (1947); *McShane v. Moldovan*, 172 F.2d 1016, 1020 (6th Cir. 1949). *See also State of Arkansas v. Central Surety & Ins. Corp.*, 102 F.Supp. 444, 448 (W.D.Ark.1952).

The effect of the overlapping coverage of these statutes is to grant power if not to place a duty on the United States to prosecute, with the criminal sanction, the same deprivations of rights of which the TDC inmates complain in their civil action. However, it is extremely doubtful that criminal penalties would be effective, or even fully adequate, to vindicate the coverage promised by §§ 241 and 242. The complaints allege widespread, systemic and systematic deprivations of civil rights; many of the alleged abuses, such as the inadequacy of medical treatment and of housing and working conditions, are the products of poor facilities and insufficient allocation of resources to meet minimal prisoner needs. The criminal sanction is singularly inappropriate in these instances, because it reaches only the individual or individuals attached to the facility and not the root of the deprivation—the facility itself. Even where the criminal sanction reaches those responsible for the policy implementation and administration that perpetuates inadequate facilities and conditions, penalties guarantee only that the specific individual in question will not continue so to act; they fail to insure that *no one* will act, or be placed in a position to act, in such a way as to continue deprivation of rights by the maintenance of constitutionally inadequate facilities. Were the United States to be limited to prosecutions under §§ 241 and

4. 28 U.S.C. § 517 provides in pertinent part: "The Solicitor General, or any other officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State * * *."

242 to relieve such deprivations of rights, enforcement of the Congressional protection embodied in the statutes would be reduced to isolated and seriatim remedies that would barely scratch the surface of such constitutional infirmities as are alleged to exist here. I decline, as the Supreme Court did in *United States v. Republic Steel Corp.*, 362 U.S. 482, 492, 80 S.Ct. 884, 890, 4 L.Ed.2d 903 (1960) to impute "to Congress a futility inconsistent with the great design of this legislation." Instead, I believe that where "criminal liability [is] inadequate to ensure the full effectiveness of the statute which Congress had intended," *Wyandotte Co. v. United States*, 389 U.S. 191, 202, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967), the United States may seek a civil "remedy that ensures the full effectiveness of the Act." *Id.*, 389 U.S. at 204, 88 S.Ct. at 387.

The principle of permitting civil relief where criminal sanctions are inadequate or ineffective is deeply rooted in the common law. *Cf. Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 38-40, 36 S.Ct. 482, 60 L.Ed. 874 (1916). *See also J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). It is "in accordance with [the] general rule of the law of torts. *See* Restatement (Second) of Torts § 286." *Wyandotte Co. v. United States, supra*, 389 U.S. at 202, 88 S.Ct. at 386. There is no reason to deprive the United States, and those whose rights it is responsible to protect, of the benefit of the rule. *Id.*

I would hold, therefore, that the United States was entitled to seek civil relief in *Ruiz* based on the scope and the mandate of the protection guaranteed by analogous criminal statutes, and thus that the "claim" of the United States, within the meaning of Rule 24(b)(2), F.R. Civ.P., was not only "common" but identical to that asserted by the original *pro se* plaintiffs. Consequently, the trial court acted within the "sphere of [its] discretionary power" in permitting the United States to intervene permissively pursuant to the Rule.[5]

Accordingly, the petition for a Writ of Mandamus and/or other extraordinary relief is denied and the stay of proceedings in *Ruiz v. Estelle* entered by this Court on February 28 is vacated.

It is so ordered.

GODBOLD, Circuit Judge (concurring in part):

I concur in the conclusion in Part II of Judge Tuttle's opinion that mandamus should be denied. My analysis is, however, slightly different.

While petitioner employs the rubric of abuse of discretion it seems to me that this case does not fall neatly within that category. Rather petitioner's basic contention is that as a matter of law (and

5. I note that today's result is consistent with the practice of several district courts in this Circuit which have invited the United States to act as *amicus curiae* or have permitted its participation as plaintiff-intervenor in suits involving alleged system-wide health facilities. *See* I. Prison Cases: Hooks v. Wainwright, 352 F.Supp. 163 (M.D.Fla.1972); Gates v. Collier, 349 F.Supp. 881 (N.D.Miss.1972); *aff'd* 501 F.2d 1291 (5th Cir. 1974); Newman v. Alabama, 349 F.Supp. 278 (M.D.Ala.1972); *aff'd* 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, — U.S. —, 95 S.Ct. 1680, 44 L.Ed.2d 102 (April 28, 1975); Costello v. Dugger, 353 F.Supp. 1324 (M.D.Fla.1972); II. Hospital Case: Wyatt v. Stickney, 334 F.Supp. 1341 (M.D.Ala.1971), 344 F.Supp. 373 (M.D.Ala.1972), 344 F.Supp. 387 (M.D.Ala.1972), *aff'd* 503 F.2d 1305 (5th Cir. 1974). Participation by the United States has been appropriate in these cases not only to vindicate the federal interests we have outlined above, but to insure that indigent plaintiffs receive the quality of legal representation commensurate with the rights of which they claim they have been deprived. I cannot ignore the fact that prisoners and mental patients are almost invariably indigents who are represented by unpaid or low-paid appointed counsel lacking the means and resources completely to develop their claims. Without the participation of the United States, meritorious claims might fail for sheer lack of legal manpower. I would not be comfortable with the obvious result—that only minor constitutional deprivations on a small scale could be successfully vindicated, while wide-spread, multifaceted deprivations went uncured due simply to the awesome magnitude of their evil.

not as a matter of discretion granted to the court under Rule 24)[1] the District Court was required to deny the petition of the United States to intervene. I would phrase that matter of law as being the question of whether the United States had the requisite interest to satisfy Rule 24. This threshold question of law is decided one way or the other like any other question of law, with no discretion involved. If the court decided that the government did possess the necessary interest, then the discretion provided by Rule 24 would come into play.

Thus the issue is not the trial judge's range of discretion, see *S.E.C. v. Krentzman*, 397 F.2d 55 (CA5, 1968), but an alleged error of law antecedent to any exercise of discretion. The coincidental existence of discretion in Rule 24 should not lead us to review by mandamus the antecedent question of law under the abuse of discretion rubric. A ruling on a question of law may be challenged as so egregiously erroneous that the court's action should be deemed a usurpation of power. See *United States Alkali Exp. Asso. v. United States*, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945); *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). Such an extremely bad judicial decision might justify mandamus under the rubric of "usurpation." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566, 1572 (1945). The question presented here is a close one. The trial judge's decision, if erroneous, was not so egregious as to constitute a usurpation of power.

Moreover, to the degree that usurpation may turn not on the closeness of the legal question but rather on the adverse effects on the aggrieved party, *cf., De Beers Consol. Mines, supra*, petitioner here is suffering no consequences of the type and magnitude that should cause us to exercise our power to issue extraordinary writs. Petitioner is in court as a defendant, and presumably he must go through trial in any event. While he objects to being subjected to discovery at the behest of the United States, the other parties plaintiff unquestionably have the identical right, though possibly not the same means and manpower, to pursue discovery.

Whatever the ultimate decision on the merits of this case, the question of the propriety of intervention by the United States can be considered on appellate review in the usual course of litigation.

I agree that interference by mandamus at this stage of these proceedings would be improper.

1. That discretion goes to the convenience of the parties, the smooth functioning of the courts, the fairness of intervention to each of the parties, and like factors.

NATURAL RESOURCES DEFENSE COUNCIL, INC., Project on Clean Air, Save America's Vital Environment, Inc., Janey Weber and Susanne Allstrom, Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, Respondent.

No. 72-2402.

United States Court of Appeals, Fifth Circuit.

July 28, 1975.

Petition for Review of an Order of the Environmental Protection Agency (Georgia Case).

Richard E. Ayres, Washington, D. C., Ogden Doremus, Savannah, Ga., for petitioners.

Russell E. Train, Administrator, Environmental Protection Agency, Kent Frizzell, Asst. Atty. Gen., Edmund B. Clark, John D. Helm, Attys., Dept. of Justice,

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
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October 6, 1975

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ENFORCEMENT DIVISION
ATTORNEY GENERAL'S OFFICE

TO ALL COUNSEL OF RECORD

No. 75-1464 IN RE: W.J. ESTELLE, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing on banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by June H Parent
Deputy Clerk

cc: Mr. John L. Hill
Messrs. George R. Bedell
Daniel O. Goforth
Mr. William Wayne Justice
Messrs. Jack W. Flock
Mike A. Hatchell
Mr. Roby Hadden
Mr. William Bennett Turner
Ms. Gail Littlefield
Mr. J. Stanley Pottinger

U.S. COURT OF APPEALS
FILED
OCT 31 '75
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

EXHIBIT C

NO. 75-1464

In Re: W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
ET AL.,

Petitioners.

- - - - - -

Appeal from the United States District Court
for the Eastern District of Texas

- - - - - -

O R D E R:

ON CONSIDERATION of the motion of petitioners
for recall and stay of judgment issued as mandate in the above entitled and numbered cause,

IT IS ORDERED that said motion be, and it is hereby DENIED.

UNITED STATES CIRCUIT JUDGE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 25, 1975

Honorable John L. Hill
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

Attn: Ed Idar, Jr., Esq.
Asst. Attorney General

RE: W. J. Estelle, Jr., Director, Texas Department of Corrections v. Honorable William Wayne Justice, United States District Judge for the Eastern District of Texas, No. A-435

My dear Mr. Hill:

Your application for stay together with the response of the Solicitor General of the United States filed thereto has been presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied
L. F. P.
11/25/75."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Paul L. Jones

Paul L. Jones
Assistant Clerk

dam

cc: The Solicitor General of the United States

Honorable William Wayne Justice
Judge, United States District Court for the
Eastern District of Texas

Jack W. Flock, Esq. and Michael A. Hitchell, Esq.

William Bennett Turner, Esq.

(1) Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972) and 344 F. Supp. 387 (M.D. Ala. 1972), aff'd, 503 F.2d 1305 (5th Cir. 1974)--the United States was appointed as a litigating amicus curiae in case establishing right to treatment and minimum Constitutional standards for habilitation of the mentally ill and mentally retarded in Alabama state hospitals;

(2) Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) and 383 F. Supp. 53 (E.D. Tex. 1974), appeal pending--the United States appeared as amicus curiae in case establishing the Constitutional right to rehabilitation of juvenile delinquents in Texas youth facilities;

(3) Halderman v. Pennhurst, No. 74-1345 (E.D. Pa.)--on January 17, 1975 the court granted the United States' motion to intervene in this class action charging unconstitutional care and treatment of mentally retarded residents of a large Pennsylvania state school and hospital;

(4) Stoner v. Miller, 377 F. Supp. 177 (E.D. N.Y. 1974)--the United States appeared as amicus curiae in this case declaring unconstitutional local ordinances banning or evicting recently deinstitutionalized mentally ill persons from a New York city's hotels and boarding houses;

A3

(5) New York Association for Retarded Children and Parisi v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1972)--the United States is participating in this case as litigating amicus curiae establishing the constitutional right of mentally retarded residents of a New York state school to be free from physical, emotional, educational and social harm;

(6) North Carolina Association for Retarded Children v. North Carolina, No. 3050 (E.D. N.C.)--the United States is participating as plaintiff-intervenor in a statewide suit concerning the care and treatment of mentally retarded residents of four state institutions and the right of school age mentally retarded persons to be educated in the public schools;

(7) United States v. Solomon, No. N-74-181 (D. Md.)--the United States instituted this suit on February 22, 1974 alleging unconstitutional deprivations of right of the mentally retarded to be free from physical harm and to be housed in habilitative program in a state school and hospital;

(8) Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974)--the United States appeared as litigating amicus curiae in this case concerning deprivations of the right to treatment for mentally ill persons at a state maximum security hospital. The issue of constitutionality of commitment will be heard separately by a three-judge court;

(9) United States v. Kellner, No. 74-138 (D. Montana)--the United States filed this suit on November 8, 1974 alleging deprivation of care, treatment, training, and education for mentally retarded residents of state institution as well as failure to provide decent living conditions, free from harm and that residents perform non-therapeutic work without compensation;

(10) Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973)--the United States is participating as amicus curiae in this case concerning right to treatment for mentally retarded residents of state institution;

(11) Alexander v. Hall, No. 72-209 (D.S.C.)--the United States was granted status of plaintiff-intervenor in suit challenging constitutionality of South Carolina's statutes governing commitment of the mentally ill and alleging violations of the right to treatment;

(12) Jenkins v. Cowley, No. 3-74-395-C (N.D. Texas)--the United States is appearing as litigating amicus curiae in this statewide suit concerning the right to treatment in Texas mental hospitals;

(13) Stamus v. Hospitalization Commission for Polk County, No. 73-162-2 (S.D. Iowa)--the United States is plaintiff-intervenor in this suit before a three-judge court challenging constitutionality of Iowa statutory procedures for involuntary commitment of persons alleged to be mentally ill.

Supreme Court, U. S.
FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

No. 75-928

In the Supreme Court of the United States

OCTOBER TERM, 1975

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, ET AL.,
PETITIONERS

v.

WILLIAM WAYNE JUSTICE, U.S. DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

WALTER W. BARNETT,
JOHN C. HOYLE,
Attorneys,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-928

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, ET AL.,
PETITIONERS

v.

WILLIAM WAYNE JUSTICE, U.S. DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 31(b)-39) is reported at 516 F.2d 480.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1975 (Pet. App. 31(b), 38). A timely petition for rehearing and suggestion of rehearing

en banc was denied on October 6, 1975 (Pet. App. 40). The petition for a writ of certiorari was filed on December 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in denying a petition for a writ of mandamus which contended that "the trial court abuse[d] its discretion when it permitted the United States to intervene" (Pet. App. 33) under Rule 24(b), Fed. R. Civ. P., in a civil rights suit alleging widespread deprivations of the constitutional rights of inmates in the custody of the Texas Department of Corrections.

RULE AND STATUTES INVOLVED

The pertinent provisions of Rule 24(b), Fed. R. Civ. P. are set forth at Pet. 3.

18 U.S.C. 241 provides:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * *

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

18 U.S.C. 242 provides:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

STATEMENT

Petitioners [1] seek review of the denial by the court of appeals of their "Application for A Writ of Mandamus And/Or Other Extraordinary Relief." The application sought to prevent further participation by the United States as plaintiff-intervenor, or as *amicus curiae* with full rights of a party, in *Ruiz* v. *Estelle*, No. 5523, E.D. Tex. (Pet. App. 34).

Ruiz was initiated more than three years ago by eight inmates of TDC who filed individual complaints under 42 U.S.C. 1983 complaining that their constitutional rights had been violated in several ways and asking for declaratory and injunctive relief (Pet. App. 33). Pursuant to Rule 42(a), Fed. R. Civ. P., the district court consolidated the complaints into a single civil action (Pet. App. 33). The court of ap-

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[1] Petitioners are the Director of the Texas Department of Corrections ("TDC") and the Chairman and members of the Texas Board of Corrections (Pet. 1, n. 1).

peals summarized the amended allegations as follows (*id.* at 33, n. 1):

> It alleges that the TDC subjects inmates to cruel and unusual punishment (by inadequately providing for their personal security and safety, by failing to provide minimally adequate medical care, and by forcing them to live and work under unsafe conditions), and that the TDC deprives its inmates of Due Process of Law by interfering with their access to lawyers and the courts (by impeding communications and punishing such communications).

After holding that the case could proceed as a class action (*id.* at 33), the district court ordered the United States to participate in the case as an *amicus curiae* "with the full rights of a party" (*id.* at 1-2). The United States conducted initial pretrial discovery in its capacity as *amicus curiae*, and then filed a motion with the court to intervene as a party plaintiff pursuant to Rule 24(b)(2), Fed. R. Civ. P. (Pet. App. 11). The district court granted the United States' motion on December 6, 1974 (*id.* at 25), and ordered its complaint in intervention (*id.* at 13-24) filed. Thereafter the United States commenced substantial pretrial discovery (*id.* at 33).

On January 30, 1975, petitioners moved to dismiss the United States as plaintiff-intervenor and as *amicus curiae* (*id.* at 34). Following a hearing, the court denied petitioners' motion and declined to certify an interlocutory appeal under 28 U.S.C. 1292 (b) (*ibid.*). Petitioners then filed a "Petition for A Writ of Mandamus and/or Other Extraordinary Re-

lief" in the court of appeals, contending that "the trial court abuse[d] its discretion when it permitted the United States to intervene in *Ruiz*" (Pet. App. 33).

A panel of the court of appeals denied the petition (Pet. App. 38), and a petition for rehearing and suggestion of rehearing *en banc* was also denied (Pet. App. 40). The court held that petitioners had failed to establish that any substantial hardship or irreparable harm would result from observing the established rule of reviewing such interlocutory orders on appeal from the final judgment (*id.* at 35-36, 39). The judges, however, differed slightly on other reasons why they believed mandamus was inappropriate. Judges Tuttle and Morgan found no abuse of discretion by the district court that would justify thwarting the congressional policy against piecemeal appeals (*id.* at 35). Judge Godbold, concurring, stated that he thought the question was not one of abuse of discretion, but rather whether as a "matter of law * * * the United States had the requisite interest to satisfy Rule 24" (*id.* at 38-39). He reasoned that mandamus is not available here because the district court's decision, even if erroneous, "was not so egregious as to constitute a usurpation of power" (*id.* at 39).

Judge Tuttle reached the merits of whether the district court erred in permitting the United States to intervene pursuant to Rule 24(b)(2). He concluded that the district court acted within its discretion because the United States had a "claim" in common with the plaintiffs within the meaning of

Rule 24(b)(2)[2] (Pet. App. 38). That "claim" is based on the "scope and mandate of the protection guaranteed by analogous criminal statutes [18 U.S.C. 241, 242]" which authorize the United States to bring criminal actions against persons acting under color of law who deprive others of rights secured by the Constitution and laws of the United States (*id.* at 37-38). Because it is "extremely doubtful that criminal penalties would be effective, or even fully adequate" in the present situation (*id.* at 37), Judge Tuttle, relying on *Wyandotte Co.* v. *United States*, 389 U.S. 191, concluded that the United States may seek a civil remedy in order to ensure the full effectiveness that Congress intended (Pet. App. 38).[3]

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[2] Rule 24(b)(2) provides, in pertinent part: "Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

Because Judge Tuttle found that participation by the United States fell within the express language of Rule 24(b)(2), it was unnecessary for him (Pet. App. 36) to reach the other two grounds relied upon by the United States: (1) inherent authority to participate in litigation affecting its interest (see, *e.g.*, *In re Debs*, 158 U.S. 564); and (2) general statutory authority for such participation provided by 28 U.S.C. 517, which says, in part: "The Solicitor General, or any other officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interest of the United States in a suit pending in a court of the United States, or in a court of a State * * *."

[3] Applications for stays of the judgment were denied by the court of appeals (Pet. App. 41) and by Mr. Justice Powell (Pet. App. 42).

ARGUMENT

The court of appeals correctly held on this record that the district court's order allowing permissive intervention by the United States should not be reviewed on an interlocutory application for relief in the nature of mandamus.

Congress established a strong policy against piecemeal review in 28 U.S.C. 1291, which limits the courts of appeals to review of final judgments. This policy is subject to carefully limited exceptions, which are not applicable, ~~and~~ were not invoked, in this case.[4] Petitioners cannot avoid this firm rule of finality by seeking review of interlocutory orders under the guise of mandamus. That extraordinary writ is reserved for really extraordinary causes. *Will* v. *United States*, 389 U.S. 90, 107; *Ex parte Fahey*, 332 U.S. 258, 259-260. It is neither a substitute for appeal nor a device to control the exercise of discretion by the district courts. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383.

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[4] Petitioners proceeded ~~only~~ by petition for mandamus or like relief. Interlocutory injunctions and certain non-final orders relating to receiverships, admiralty and patents are appealable under 28 U.S.C. 1292(a). Interlocutory orders certified as involving a controlling question of law whose appeal may substantially advance disposition of the litigation can be permitted by a court of appeals under 28 U.S.C. 1292(b). In addition, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546, recognizes that certain preliminary orders may be final for purposes of appeal where substantial rights affected by an interlocutory order cannot be preserved for appeal from the final judgment. An order simply allowing permissive intervention fits none of these categories.

See p. 4, supra

A request for permissive intervention under Fed. R. Civ. P. 24(b), in contrast to a claim for intervention as of right under Rule 24(a), is addressed to the district court's sound discretion. Wright and Miller, *Federal Practice and Procedure: Civil*, § 1913 (1972).[5] The legal basis for the exercise of that discretion may ultimately be challenged on appeal from the final judgment, but not until then, because an order granting permissive intervention is interlocutory. *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180 (C.A. 9).[6]

Petitioners contend (Pet. 15-17), nevertheless, that mandamus is available in this case because the district court's order permitting intervention by the United States is said to exceed the court's jurisdiction so grossly as to amount to a willful usurpation of power. *Schlagenhauf* v. *Holder*, 379 U.S. 104. But it is well established that a district court has discretion to permit intervention by the United States under

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[5] See, *e.g.*, *Hodgson* v. *United Mine Workers*, 473 F.2d 118, 125, n. 36 (C.A. D.C.); *Nuesse* v. *Camp*, 385 F.2d 694, 706 (C.A. D.C.); *Edmondson* v. *Nebraska*, 383 F.2d 123 (C.A. 8); *Springer* v. *Best*, 264 F.2d 24 (C.A. 9); *Manufacturers Trust Co.* v. *Kelbey*, 125 F.2d 650, 655 (C.C.A. 2), certiorari denied, 316 U.S. 697.

[6] See, *e.g.*, *Zito* v. *Tesoriero*, 239 F. Supp. 354 (E.D. N.Y.); *Herter* v. *Helmsley-Spear, Inc.*, 149 F. Supp. 713 (S.D. N.Y.); *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass.); *Mutual Chemical Co. of America* v. *Mayor and City Council of Baltimore*, 33 F. Supp. 881 (D. Md.).

Rule 24(b).[7] Bare assertions of error in the exercise of that discretion do not establish a usurpation of jurisdiction. *Will* v. *United States, supra*, 389 U.S. at 104.

Petitioners' argument rests on a single proposition: by providing for certain types of participation by the Attorney General in civil rights litigation, Congress is supposed to have intentionally denied the United States any other basis on which to assert a claim or defense involving a question of law or fact common to a private civil rights action. Aside from petitioners' confusion of authority under the Civil Rights Act of 1964, 78 Stat. 241, as amended, 42 U.S.C. 1971, *et seq.*, to bring original actions (*e.g.*, 42 U.S.C. 1971(c), 1973(b) and (c), 1973j(d) and (e), 2000e-6, 3613), to intervene as of right (42 U.S.C. 2000h-2), and to intervene permissively (*e.g.*, 42 U.S.C. 2000a-3(a) and 2000e-6), they misapprehend the operation of Rule 24(b)(2).

Rule 24(b) provides for permissive intervention in three distinct circumstances: 1) when a statute confers a conditional right to intervene; 2) when the applicant's claim or defense and the main action

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[7] There is no substantial liklihood that petitioners' objection to the permissive intervention of the United States in this case would become moot upon appeal from the grant or denial of final relief. The United States would be an appellee in any appeal noticed by petitioners, and they could specifically challenge its intervention. If the United States or the original plaintiffs appeal, petitioners may challenge the United States' intervention by a timely cross-appeal under Fed. R. App. P. 4(a). See Wright and Miller, *Federal Practice and Procedure: Civil*, § 1923 (1972).

have a common question of law or fact; or 3) when a government officer or agency seeks to intervene because a party relies on a statute or regulation the officer or agency administers. The absence, in a particular case, of an express statute authorizing permissive intervention under the first clause of the rule obviously does not foreclose intervention under the other two, or they would be empty surplusage. Nor, contrary to petitioners' contentions, do concepts of standing developed for determining the justiciability of private constitutional challenges to governmental action apply when the government intervenes to assert a public interest under the second clause. Rule 24(b)(2) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Securities and Exchange Commission* v. *United States Realty Co.*, 310 U.S. 434, 459. See also *Nuesse* v. *Camp*, 385 F. 2d 694, 705-706 (C.A. D.C.).[8]

Congress has recognized that the law provides a broad basis for intervention by the government to

[8] In *United States Realty, supra,* a government agency was permitted to intervene in an arrangement proceeding under Chapter XI of the Bankruptcy Act, despite the absence of express authority for permissive intervention under that Chapter. The intervention was permitted so that the agency could assert the public interest in having the parties proceed by reorganization under Chapter X. Thus petitioner's reliance on such "private standing" cases as *Warth* v. *Seldin*, 422 U.S. 490, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, and *United States* v. *Richardson*, 418 U.S. 166, is beside the mark.

assert public interests. In the Civil Rights Act of 1964 it expressly provided, in addition to that Act's specific authorizations of original suits and intervention as of right or by permission, that "[n]othing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or office thereof under existing law to institute or intervene in any action or proceeding." 42 U.S.C. 2000h-3.

Under this provision, and Rule 24(b)(2), the United States demonstrated a substantial basis for intervention on the ground that the main action here involved questions of law or fact common with the legal responsibilities of the United States. The United States has statutory responsibility for enforcing 18 U.S.C. 241 and 242, the criminal counterpart to 42 U.S.C. 1983, the statute on which the original action is based. See *United States* v. *Price*, 383 U.S. 787, 794 and n. 7.[9] As Judge Tuttle observed (Pet. App. 38):

> [T]he United States was entitled to seek civil relief * * * based on the scope and the mandate of the protection guaranteed by analogous criminal statutes [18 U.S.C. 241, 242], and thus that the "claim" of the United States, within the meaning of Rule 24(b)(2), F.R.Civ.P., was not

[9] The responsibility of the United States to protect the rights secured by the Constitution is no less broad than its responsibility to protect interstate commerce from obstruction (*In re Debs*, 158 U.S. 564, 581-582), the public lands from fraud (*United States* v. *San Jacinto Tin Co.*, 125 U.S. 273), or the integrity of the patent system (*United States* v. *Bell Telephone Co.*, 128 U.S. 315, 367).

> only "common" but identical to that asserted by the original *pro se* plaintiffs. Consequently, the trial court acted within the "sphere of [its] discretionary power" in permitting the United States to intervene permissively pursuant to the Rule (footnote omitted).

For correction of widescale abuses in a state correctional system, criminal sanctions are obviously "inadequate to ensure the full effectiveness of the statute which Congress had intended," *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202. The United States may therefore seek a civil remedy to ensure the full effectiveness of the statutory guarantees of civil rights. Cf. *id.* at 204; see also *United States* v. *Republic Steel Corp.*, 362 U.S. 482, *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33; *J. I. Case Co.* v. *Borak*, 377 U.S. 426.[10] This rationale alone provided a sufficient basis for permitting intervention subject to ultimate review on appeal from the final judgment, where, as here, the subject of the original actions involves the constitutional rights of all inmates in a large state prison system.[11]

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[10] Cf. *United States* v. *Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D. N.Y.); *United States* v. *City of Shreveport*, 210 F. Supp. 36 (W.D. La.); *United States* v. *Brittain*, 319 F. Supp. 1058 (N.D. Ala.).

[11] Neither *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, nor *New York Times Co.* v. *United States*, 403 U.S. 713, bears on whether the court of appeals should have granted mandamus. *Youngstown* involved direct executive seizure of private property, to prevent a nationwide strike, without any statutory authority to act. In *New York Times* the government sought an injunction which would have imposed a prior restraint on publication of government documents. The Court held only that the government had not met the First Amendment's heavy burden of justification for a prior restraint. In contrast to *New York Times*, participation by the United States as a party in this case will help secure, rather than infringe, rights guaranteed by the Constitution which Congress has sought to protect through 42 U.S.C. 1983, and 18 U.S.C. 241 and 242.

In any event, petitioners are not threatened with an irreparable injury so great as to warrant extraordinary relief. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30-31; *United States Alkali Assn.* v. *United States*, 325 U.S. 196. Petitioners' real complaint is that they will be subject to effective discovery if the United States participates. But this is not significant, for "the other parties plaintiff unquestionably have the identical right, though possibly not the same means and manpower, to pursue discovery" (Pet. App. 39). Thus, as the court of appeals correctly held (Pet. App. 35):

> * * * the expense and inconvenience of a trial as a prerequisite to review has been held not to justify the issuance of mandamus without more. * * * [M]oreover, the claim of hardship of which petitioner complains here is either unexceptionable or premature. It is unexceptionable because it is no more than the full and vigorous discovery that a large system-wide class action anticipates. * * * [T]he petitioner's complaint as to the scope and cost to him of the discovery sought by the United States is premature, because the trial court has yet to rule on the petitioner's motions

to limit and prevent certain aspects of the inquiries proposed by the United States.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

WALTER W. BARNETT,
JOHN C. HOYLE,
Attorneys.

MARCH 1976.

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[12] Petitioners also contend that it was error for the district court to allow the United States to participate earlier in this litigation as *amicus curiae* "with full rights of a party" (Pet. 2, 8, n. 2). Because the United States is no longer participating as *amicus*, this issue would appear to be moot unless the United States were dismissed as an intervenor and reinstated as *amicus*. In any event, it was proper for the district court to invite, and permit, the United States to participate as *amicus* with broad rights in order to assist the court in the determination of the complex issues involved here. Cf. *Ex parte Peterson*, 253 U.S. 300, 312-313; *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581; *Faubus* v. *United States*, 254 F.2d 797 (C.A. 8), certiorari denied, 358 U.S. 829.

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